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Supreme Court of the United States

October Term 1968

No. [redacted] 180

FRED COSENTINO,

Petitioner,

against

THE ROYAL NETHERLANDS STEAMSHIP COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
Attorney for Petitioner.

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No.

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Petitioner,

against

THE ROYAL NETHERLANDS STEAMSHIP COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on January 18, 1968.

Opinion Below

The opinion of the United States District Court for the Eastern District of New York, dated January 18, 1966.

The opinion of the Court of Appeals for the Second Circuit is not as yet reported and is printed herein at pages 32 to 34.

Jurisdiction of this Court

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Should a Trial Judge be permitted to order a conditional remittitur when he finds that the jury verdict is in his opinion excessive without a finding that the verdict shocked his conscience or was based on prejudice?

2. Should a Trial Judge exert pressure on a plaintiff to accept a reduction of the amount of damages found by a jury, by ordering a retrial of the issue of liability, as well as damages, if plaintiff should refuse to accept the reduction, when, in fact, the issue of liability has been fully and properly determined on the merits and has become res adjudicata?

Reasons for Granting the Writ

The questions presented raise issues which must be determined by trial judges in the Federal Judiciary very frequently during the course of the ever expanding work load of the Federal Courts. It is of importance that these issues be clearly determined by the Court for the proper and uniform administration of justice in the Federal Judicial system. A holding by this Court on the obligation of a Federal Judge to order a retrial of only those issues in a case deemed affected by error would eliminate a substantial amount of needless litigation involving issues previously determined which if otherwise retried would constitute a denial and miscarriage of justice in violation of constitutional guarantees of trial by jury.

The decision by the Court below is in conflict with uniform and well established law and in violation of the constitutional rights of all personal injury victims to a trial by jury.

The decision by the Court below constitutes a violation of the Seventh Amendment of the Constitution of the United States.

The decision by the Court below is in violation of Rule 59(a) of theFederal Rules of Civil Procedure.

The decision by the Court below was clearly and unquestionably in conflict with the decision by this Honorable Court in the case of *Gasoline Products Co., Inc.*, v. *Champlin Refining Co.*, 283 U.S. 494, 51 S. Ct. 513, wherein the Court held at page 515:

> "Here we hold that, where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again. As the issues arising upon petitioner's cause of action on the royalty contract are clearly separable from all others and the verdict as to them already given is free from error, it need not be disturbed. But the question remains whether the issue of damages is so distinct and independent of the others, arising on the counterclaim, that it can be separately tried."

The Court in the case of *May Department Stores Co.* v. *Bell*, 61 F.2d 830, cited *Gasoline Products Co., Inc.*, v. *Champlin Refining Co., supra,* and, in addition thereto, quoted from the case of *Simmons* v. *Fish*, 210 Mass. 563, 97 N.E. 102, as follows:

> "In Simmons v. Fish, 210 Mass. 563, 568, 97 N.E. 102, 104, Ann. Cas. 1912D, 588, the court said:
>
> > 'The guiding principle is that, although a verdict ought not to stand which is tainted with illegality, there ought to be but one fair trial upon any issue, and that parties ought not to be compelled to try anew a question once disposed of by a decision against which no illegality can be shown. * * *' "

Statement

Appellant, an American citizen, born October 25, 1900, employed aboard the SS Artemis as a longshoreman, was injured on the 10th day of November, 1961 (34a-35a).*

He described the occurrence as follows (36a):

> "Q. Go ahead. Tell the jury exactly what happened that morning. A. Then, we had put three or four drafts of pipe on deck. The lighter captain hollered up to us—we were on deck—for somebody to move the line because it was windy and every time they took up a draft, the lighter would hit the side of the ship. So the captain of the lighter asked us to move the lines. So we moved the breastline and the springline from one cleat to another (5). As I was walking with the rope to move from one cleat to another, there was grease and dirt on deck —and I was careful stepping over these ropes but I slipped and went into the rope and tripped and fell down and hurt my knee."

The jury, before Hon. John F. Dooling, Jr. United States District Judge, returned a verdict of $25,000. Judgment was entered January 18, 1966 (1a).

On February 2, 1966, Judge Dooling entered an order "for a new trial unless plaintiff within 10 days of the date of this order remits of record $12,000 of the verdict of $25,000" (84a). The appellant refused to remit (1a).

The Court, although stating "On the issue of liability, the verdict seems to be beyond challenge" (83a), nevertheless reversed this view and ordered the case retried on the question of liability, as well as damages.

The case was retried before Hon. John R. Bartels, United States District Judge, resulting in a verdict in favor of the appellant in the sum of $1,800.00. Judgment was entered on February 17, 1967 (1a).

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* Numbers in parentheses refer to pages of the appendix.

ARGUMENT

The Court below has enunciated a new principle of law which, in substance, approves the action of a Trial Judge in substituting his evaluation of the damages in a personal injury case in place of a jury's verdict without a prerequisite finding that the verdict "shocks the conscience" of the Court.

It is respectfully submitted that all plaintiffs should have the right to refuse to accept a Trial Judge's evaluation of the damages without being compelled to face the risk involved in retrying the separate issue of liability, which has already been properly decided by the jury without any question of error.

The Court below stated that there was no precedent for petitioner's position. On that question, petitioner respectfully submits the following authorities wherein our Courts have uniformly held that once a question of liability has been determined then in the event of a new trial, the issue to be retried should be limited to damages only. The following citations establish the error concerning the Court's holding as to the absence of precedent:

Dodson v. *Raker*, 1 F.R.D. 368;
Chesevski v. *Strawbridge & Clothier*, 25 F. Supp. 325;
Huddleston v. *Crain Brothers, Inc.*, 183 F. Supp. 874;
McSparran v. *Hanigan*, 225 F. Supp. 628 (1963);
Boldurian v. *A/B Svenska Amerika Linien*, 246 F. Supp. 413 (1965);
Thompson v. *Camp*, 167 F.2d 733;
Rosa v. *City of Chester, Pa.*, 278 F.2d 876;
The Noah's Ark v. *Bentley & Felton Corporation*, 292 F.2d 437 (1961);
Mason v. *Mathiasen Tanker Industries, Incorporated*, 298 F.2d 23 (1962);

Jamison v. *A.M. Byers Company,* 330 F.2d 657 (1964);
Mertens v. *Flying Tiger Line, Inc.,* 341 F.2d 851 (1965);
Downie v. *United States Lines Co.,* 359 F.2d 344 (1966);
Guilford Glazer v. *Jerome S. Glazer and Louis A. Glazer,* 278 F. Supp. 476 (1968);
Kovacovich v. *Phelps Dodge Corp.* (1945) 62 Ariz. 193, 156 P. 2d 240;
Mayo v. *Ephrom* (1958) 84 Ariz. 169, 325 P2d 814;
Gentekos v. *San Francisco* (1958) 163 Cal. App. 2d 691, 329 P. 2d 943;
Farrar v. *Wheeler* (1906 Cal. NH) 145 F. 482;
Norfolk Southern R. Co. v. *Ferebee* (1915) 238 U.S. 269, 59 L. ed. 1303, 35 S. Ct. 781;
Hiltz v. *Atlantic Ref. Co.* (1945 Ca. 3 Pa.) 151 Fed. 2 159;
Atlantic Coast Line R. Co. v. *Bennett* (1958 Ca. 4 SC) 251 F.2 934;
Atchison, T.&S.F. R. Co. v. *Gutierrez* (1926) 30 Ariz. 491, 249 P. 66;
Palmer v. *Kelly* (1938) 52 Ariz. 98, 79 P2 344;
Hirsh v. *Manley* (1956) 81 Ariz. 94, 300 P2d 588;
Moeller v. *Market Street R. Co.* (1938) 27 Cal. App. 2d 562, 81 P2 475;
Brewer v. *Second Baptist Church* (1948) 32 Cal. 2d 791, 197 P2d 713;
Nixon v. *Lawhon* (1954) 32 N.J. Super. 351, 108 A2d 480;
Comarow v. *Levy* (1952 Sup. App. T.) 115 N.Y.S. 2d 873;
First Mechanics Nat. Bank v. *Katz* (1955) 36 N.J. Super. 552, 116 A2d 644;
Cannon v. *Krabowitch* (1959) 54 N.J. Super. 93, 148 AL 213;

Millworth Converting Corp. v. *Slifka* (1960) 10 App. Div. 2nd 568, 195 N.Y.S. 2d 536;
Spartis v. *Pocas* (1947 Sup. App. T.) 68 NYS 2d 462;
Burton v. *Wilmington & W. R. Co.*, 84 N.C. 192;
Strother v. *Aberdeen & A. R. Co.*, (1898) 123 N.C. 197;
Johnson v. *Lewis* (1960) 251 N.C. 797, 112 S.E. 2d 512;
Twenty-one Min. Co. v. *Originals Sixteen to One Mine* (1920) 265 F. 469;
Tompkins v. *Pilots Asso. for Bay & River Delaware*, 32 F. Supp. 439;
Meehan v. *Central R. Co.*, 181 F. Supp. 594;
Tsai v. *Rosenthal*, 297 F.2 614;
L. C. James Motor Co. v. *Wetmore* (1930) 36 Ariz. 382, 286 P 180;
Murrow v. *Whiteley* (1952) 125 Colo. 392, 244 P2d 657;
Mendenhall v. *MacGregor Triangle Co.* (1961) 358 P2 860;
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Rossman v. *Newton* (1934) 112 N.J.L. 261, 170 A 230;
Mangigan v. *Toolin* (1950) 77 R.I. 51, 73 A2 41;
Cote v. *Allen* (1957) 50 Wash. 2 584, 313 P2 693.

POINT I

There was no legal or factual basis for the learned Court below substituting his evaluation of the injuries for that of the jury.

Judge Dooling summarized the evidence as to damages as follows (83a):

> "The amount of the damage award raises different problems. Plaintiff was hospitalized with the right knee injury from November 15 through December 9, 1961, and on November 27, 1961, conservative treatment of the knee not being successful, the prepatella bursa was excised, some 40 or 50 superficial and deep sutures being used. There were 46 office visits for treatment ending April 6, 1962, and plaintiff used crutches until mid-February 1962. Plaintiff lost four months and four days from work. His earnings in 1960 were $5,000 to $5,500 and he had averaged $4,000 or $5,000 a year over a five year period. His direct earnings loss approximated $1,800. There was no claim of lasting impairment of earning capacity. Plaintiff returned to his regular work on March 4, 1962, and he has lost no time since his return by reason of the injury. Medical and hospital expenses were, based on a qualified estimate, $1,269.50."

The appellant testified that after being totally disabled until the middle of March, that he had to be put on light work for about a year. He testified that he still had stiffness of the leg, even up to the time of the trial; strain on picking up weight from the ground; fear of the leg buckling because of loss of strength and weakness; and, still suffered from pain on putting any weight on the leg (38a-39a).

After describing the nature and extent of the injury and treatment, Dr. Mario F. Tagliagambe concluded that the condition was permanent (2a to 32a—42a-58a).

POINT II

The Court erroneously disregarded the applicable controlling law, as enunciated by this honorable Court in the case of *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (1965).

It seems clear that the Court below denied to the appellant his constitutional right to a trial by jury, as repeatedly enunciated by the Supreme Court and as particularly pointed out by this Court in the *Berner* case, *supra*, wherein this Court quoted at page 536 from the cases of *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 64 S. Ct. 409 and *Lavendar* v. *Kurn*, 327 U.S. 645, 66 S. Ct. 740. See also: *Wilkerson* v. *McCarthy*, 336 U.S. 53, 69 S. Ct. 413.

There was nothing in the case which justifies an order directing the retrial of the question of liability. Judge Dooling himself stated that there was no basis for retrying the question of liability, his expression being that as heretofore stated, "On the issue of liability the verdict seems to be beyond challenge" (83a).

Had the verdict indicated that it was the result of an unwarranted emotional reaction on the part of the jury, then and in that event a new trial would be justified, but only as to the question of damages. *Glazer* v. *Glazer*, 374 F.2d 390 (1967).

The verdict in the sum of $1,800 in the second trial was clearly a compromise verdict, wherein the question of liability and contributory negligence was obviously a most determining factor in keeping the verdict down, as clearly indicated by defense counsel's remarks when the motion was made to set aside the verdict in the second trial.

> "Mr. McKiernan: Well, to that your Honor, I can only say that the Court charged the jury, and charged them well, on the question of contributory negligence, and to what extent it might reduce a re-

> covery—there is no way in which we can probe the minds of the jury at this stage. They may very well have found 75, 85, 95 per cent contributory negligence in the case on the part of the plaintiff."

The retrial on the question of liability constituted a serious prejudice to the appellant, in violation of his constitutional rights to a jury trial. See *Wilkerson* v. *McCarthy, supra*, and particularly the concurring opinion of Mr. Justice Frankfurter.

A verdict in the sum of $25,000 which the Court feels is almost twice as much as he should get is not so grossly excessive as to shock the Court's sense of justice and impropriety. *Delaney* v. *New York Cent. R. Co.*, 68 F. Supp. 70.

There is nothing so shocking in the verdict as to justify the setting aside of the verdict of $25,000, as was pointed out by this Court in the case of *Dagnello* v. *Long Island Rail Road Company*, 289 F.2d 797 (1961).

See also:

Lopoczyk v. *Chester A. Poling, Inc.*, 152 F.2d 457.

POINT III

Ordering the question of liability retried constituted reversible error.

As recently as August 26, 1966, in the case of *Towle* v. *Boeing Airplane Company*, 364 F.2d 590, the Court cited the controlling law as laid down by the Supreme Court of the United States, quoting from *Lawlor* v. *National Screen Service*, 349 U.S. 322, 326, 75 S. Ct. 865, 867:

> "Thus, under the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action." (Emphasis ours.)

To the same effect see:

Williams v. *Murdoch*, 330 F.2d 745 (1964);
Travelers Indemnity Co. v. *State Farm Mutual Auto, Ins. Co.*, 330 F.2d 250 (1964);
Jefferson School of Social Science v. *Subversive Act. Con. Bd.*, 331 F.2d 76 (1963).

See also:

McAllister v. *United States*, 348 U.S. 19, 75 S. Ct. 6;
Tennant v. *Peoria & P. U. R. Co., supra;*
Morales v. *City of Galveston*, 370 U.S. 165, 82 S. Ct. 1226 (1962);
Lind v. *Schenley Industries, Inc.*, 278 F.2d 79, *cert. denied.* 364 U.S. 835, 81 S. Ct. 58;
Alison v. *United States*, 251 F.2d 74 (2d Cir. 1958).

In the case of *Panto* v. *Safeway Trails, Inc.*, 260 F. Supp. 670 (1966) the Court stated at page 671:

> [1] The doctrine of collateral estoppel by judgment operates to prevent the same parties from relitigating ultimate factual issues which have actually been litigated and finally determined in adversary proceedings between them. Cromwell v. County of Sac, 94 U.S. 351, 24 L. Ed. 195 (1876). See, generally, Moore's Federal Practice, P. O. 441 et seq."

To the same effect see:

McNellis v. *First Federal Sav. & L. Ass'n of Rochester, N.Y.*, decided July 27, 1966, 364 F.2d 251;
International Breweries, Inc. v. *Anheuser-Busch, Inc.*, decided August 3, 1966, 364 F.2d 261.

In the case of *Silverii* v. *Kramer*, decided February 18, 1963, 314 F.2d 407, the Court said at page 410:

> "It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U.S. 554, 571, 572 [10 S. Ct. 1044, 34 L. Ed. 235], Tiller v. Atlantic Coast Line R. Co., supra [318 U.S. (54) 68, 63 S. Ct. (444) 451 (87 L. Ed. 610)]; Bailey v. Central Vermont Ry., 319 U.S. 350, 353, 354, [63 S. Ct. 1062, 1064, 87 L. Ed. 1444]."

Judge Medina, speaking for the Court in the case of *Dagnello* v. *Long Island Rail Road Company, supra,* decided March 24, 1961, stated at page 806:

> "If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded,[14] so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand."

The requirement that the plaintiff retry his case constitutes a violation of his rights as guaranteed by the United States Constitution, Amendment 7, as clearly pointed out in the *Dagnello* case, *supra.* (Footnote 12, page 805).

> "12. See the following comments of Mr. Justice Gray in Capital Traction Co. v. Hof, 1899, 174 U.S. 1, 13-14, 19 S. Ct. 580, 585, 43 L. Ed. 873:
>
> " 'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to

> administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and * * * to set aside their verdict, if in his opinion, it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion."

The question of liability having been fully tried and determined by a jury, it is binding in any subsequent proceeding, accordingly, in the present trial. See: *R. D. Wood Company* v. *Phoenix Steel Corporation,* 327 F.2d 921, at page 925.

In the light of the injuries and permanent disability, the granting of the second trial and the verdict therein recovered is tantamount to a denial of justice.

In the light of the uniform decision throughout the country it clearly appears, without exception, that once the question of liability is properly and fairly tried and determined, the successful plaintiff should not be required to relitigate the same issue as in the instant case, where the question of liability is completely and conclusively in nowise interwoven with the question of damages.

This new and radical departure from such uniform and well established law throughout the country places in jeopardy the American concept of a trial by jury and imposes a heavy and unconscionable burden upon a plaintiff who is compelled to choose between submitting to a remittitur or risk a retrial of his entire case with the double jeopardy of an adverse decision.

There does not seem to be a single authority approving a new trial of a question already fully tried and determined without a showing that the question of liability is interwoven

with the question of damages to such an extent that it cannot be considered independently.*

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* *United States.*—Darbrow v McDade (1958, CA3 Pa) 255 F2d 610; Bass v. Dehner (1937, DC NM) 21 F Supp 567. But see McKeon v Central Stamping Co. (1920, CA3 NJ) 264 F 385, overruled in Gasoline Products Co. v Champlin Ref. Co. (1931) 283 US 494, 75 L ed 1188, 51 S Ct 513, as stated in Darbrow v McDade (1958, CA3 Pa) 255 F2d 610, Norfolk Southern R. Co. v Forebee (1915) 238 U.S. 269 35 sct, 781 59 L.Ed. 1303.

California.—Leipert v Honold (1952) 39 Cal 2d 462, 247 P2d 324, 29 ALR2d 1185; Tumelty v Peerless Stages (1929) 96 Cal App 530, 274 P 430; Adams v Hildebrand (1942) 51 Cal App 2d 117, 124 P2d 80; Crandall v McGrath (1942) 51 Cal App 2d 438, 124 P2d 858; Wilson v Long Beach (1945) 71 Cal App 2d 235, 162 P2d 658, 163 P2d 501; Kershner v Morgali (1957) 152 Cal App 2d 884, 314 P2d 105, Gentekos v San Francisco (1958) 163 Cal. App. 2d 691, 329 P2d 943.

Colorado.—Shirley v Merritt (1961, Colo) 364 P2d 192.

Connecticut.—Murray v Krenz (1920) 94 Conn 503, 109 A 859.

Georgia.—Cowart v Strickland (1919) 149 Ga 397, 100 SE 447, 7 ALR 1110.

Illinois.—Paul Harris Furniture Co. v Morse (1956) 10 Ill 2d 28, 139 NE 2d 275; Morris v Spence (1957) 14 Ill App 2d 456, 144 NE2d 829.

Kansas.—Brokmann v Lawson (1925) 117 Kan 386, 232 P 601, quoted; Paul v Western Distributing Co. (1935) 142 Kan 816, 52 P2d 379; Posey v Johnson (1937) 145 Kan 742, 67 P2d 698; Parker v Allen (1951) 171 Kan 360, 233 P2d 514; Hukle v Kimble (1952) 172 Kan 630, 243 P2d 225.

Kentucky.—Allen v Large (1951, Ky) 239 SW2d 225; Smith v Webber (1955, Ky) 282 SW2d 346; Kearns v Sparks (1956, Ky) 296 SW2d 731.

Maine.—De Blois v Dunkling (1950) 145 Me 197, 74 A2d 221; Cosgrove v Fogg (1947) 152 Me 464, 54 A2d 538; Roy v Huard (1961, Me) 174 A2d 41.

Minnesota.—Lundblad v Erickson (1930) 180 Minn 185, 230 NW 473 (overruled on other grounds; Jimmie Motors, Inc. v Larson (1958) 253 Minn 484, 92 NW2d 803); Hanse v St. Paul C. R. Co. (1944) 217 Minn 432, 14 NW2d 473.

In *Yates* v. *Dann* (1951, RC Del) 11 FRD 386, it was stated that the theory behind Rule 59(a) of the Federal Rules of Civil Procedure, authorizing the court to grant a new trial "on all or part of the issues," is that a party who has already had his day in court as to a particular issue may not have another opportunity to relitigate the

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Mississippi.—Yazoo & M. V. R. Co. v Scott (1914) 108 Miss 871, 67 So 491, LRA1915E 239, Ann Cas 1917E 880; Sussman, Wormser & Co. v Sea Food Co. (1922) 130 Miss 632, 94 So 795.

Missouri.—Spalding v Robertson (1947) 357 Mo 37, 206 SW2d 517.

New Hampshire.—Moulton v Langley (1923) 81 NH 138, 124 A 70; Emerson v Twin State Gas & Electric Co. (1934) 87 NH 108, 174 A 779; Monroe v Sterling (1943) 92 NH 488, 32 A2d 820.

New Jersey.—More-Jonas Glass Co. v West Jersey & S. R. Co. (1908) 76 NJL 9, 69 A 491, affd 76 NJL 708, 72 A 65 (obiter); Robinson v Payne (1923) 99 NJL 135, 122 A 882; Rossman v Newbon (1934) 112 NJL 261, 170 A 230; Degenring v Kimble (1935) 115 NJL 379, 180 A 685; Phipps v Hulit (1942) 128 NJL 74, 24 A2d 506; Esposito v Lazar (1949) 2 NJ 257, 66 A2d 172; Hendrikson v Koppers Co. (1953) 11 NJ 600, 95 A2d 710; Erdo v Stahlin (1951) 11 NJ Super 305, 78 A2d 303; Justice v Weise (1951) 14 NJ Super 9, 81 A2d 178; Beggs v Pasalano (1951) 14 NJ Super 549, 82 A2d 640; Wax v Altshuler (1952) 22 NJ Super 229, 91 A2d 768.

New Mexico.—Baros v Kazmierczwk (1961) 68 NM 421, 362 P2d 798.

North Carolina.—Starnes v Tyson (1946) 226 NC 395, 38 SE2d 211.

Pennsylvania.—Daugherty v Erie R. Co. (1961) 403 Pa 334, 169 A2d 549; Cason v Smith (1958) 188 Pa Super 376, 146 A2d 634; Mains v Moore (1959) 189 Pa Super 430, 150 A2d 549; Friedman v Matovich (1959) 191 Pa Super 275, 156 A2d 608.

Rhode Island.—Sullivan v John R. White & Son (1914) 36 RI 488, 90 A 738; Riley v Tsagarakis (1933) 53 RI 261, 165 A 780.

same point unless a partial new trial will result in a miscarriage of justice, and that since the adoption of the Federal Rules of Civil Procedure, the courts have indicated a

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Vermont.—Parizo v. Wilson (1929) 101 Vt 514, 144 A 856.

Virginia.—Kirn v Bembury (1935) 163 Va 891, 178 SE 53.

Washington.—Greenwood v. Olympic, Inc. (1957) 51 Wash 2d 18, 315 P2d 295.

West Virginia.—Munden v Johnson (1926) 102 W Va 436, 135 SE 832.

Wisconsin.—Smith v Atco Co. (1959) 6 Wis 2d 371, 94 NW2d 697, 74 ALR2d 1095.

As to limitation by trial and appellate courts, recpectively.

Montana.—Seibel v Byers (1959, Mont) 344 P2d 129.

New York.—Schroeder v Syracuse Transit Corp. (1959) 9 App Div 2d 1012, 194 NYS2d 244; Vzga v Forrest (1960) 10 App Div 2d 604, 195 NYS2d 743; Hyler v. Hyer (1941) 177 Misc 68, 29 NYS2d 223.

Ohio.—Edelstein v Kidwell (1942) 139 Ohio St 595, 23 Ohio Ops 93, 41 NE2d 564.

South Carolina.—South Carolina Electric & Gas Co. v Aetna Ins. Co. (1958) 233 SC 557, 106 SE2d 276.

Texas.—Fisher v Coastal Transport Co. (1950) 149 Tex 224, 230 SW2d 522; Waples-Platter Co. v Commercial Standard Ins. Co. (1956) 156 Tex 234, 294 SW2d 375; Pinson v Dreymala (1959, Tex Civ App) 320 SW2d 152, error dismd. See Iley v Hughes (1958) 158 Tex 362, 311 SW2d 648, 85 ALR2d 1.

Montana.—Seibel v Byers (1959, Mont) 344 P2d 129.

New York.—Schroeder v Syracuse Transit Corp. (1959) 9 App Div 2d 1012, 194 NYS2d 244; Vzga v Forrest (1960) 10 App Div 2d 604, 195 NYS2d 743; Hyler v Heyer (1941) 177 Misc 68, 29 NYS2d 223.

Texas.—Fisher v Coastal Transport Co. (1950) 149 Tex 224, 230 SW2d 522, and Waples-Platter Co. v Commercial Standard Ins. Co. (1956) 156 Tex 234, 294 SW2d 375.

In Hyler v Heyer (1941) 177 Misc 68, 29 NYS2d 223, supra, the court stated that the common-law rule that a verdict was in-

trend toward limiting retrials to specific issues whenever possible, "particularly in personal injury cases where the issue of damages is independent from that relating to liability."

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divisible was still in existence in that jurisdiction, so as to preclude the limitation of a new trial to the issue of damages only.

Seibel v Byers (1959, Mont) 344 P2d 129; Fisher v Coastal Transport Co. (1950) 149 Tex 224, 230 SW2d 522; Waples-Platter Co. v Commercial Standard Ins. Co. (1956) 156 Tex 234, 294 SW2d 375; Iley v Hughes (1958) 158 Tex 362, 311 SW2d 648, 85 ALR2d 1; Pinson v Dreymala (1959, Tex Civ App) 320 SW2d 152, error dismd.

California.—Adams v Hildebrand (1942) 51 Cal App 2d 117, 124 P2d 80.

Massachusetts.—Opinion of Justices (1911) 207 Mass 606, 94 NE 846.

Minnesota.—Lee v Zaske (1942) 213 Minn 244, 6 NW2d 793.

Mississippi.—Yazoo & M. V. R. Co. v Scott (1914) 108 Miss 871, 67 So 491, LRA1915E 239, Ann Cas 1917E 880.

New Jersey.—Robinson v Payne (1923) 99 NJL 135, 122 A 882.

See McKeon v Central Stamping Co. (1920, CA3 NJ) 264 F 385 (which is referred to in Darbrow v McDade (1958, CA3 Pa) 255 F2d 610, as having been overruled in Gasoline Products Co. v Champlin Ref. Co. (1931) 283 US 494, 75 L ed 1188, 51 S Ct 513), in which it was held that the action of the District Court in granting a new trial wherein the sole issue to be determined was the amount of the damages sustained constituted a denial of the constitutional right to a jury trial preserved by the Seventh Amendment.

Munsey v Safeway Stores, Inc. (1949, Mun Ct App Dist Col) 65 A2d 598.

See also Kistler v Wagoner (1946) 315 Mich 162, 23 NW2d 387.

Bass v Dehner (1937, DC NM) 21 F Supp 567.

Norfolk Southern R. Co. v Ferebee (1915) 238 US 269, 59 L ed 1303, 35 S Ct 781; Jarrett v High Point Trunk & Bag Co. (1907) 144 NC 299, 56 SE 937.

Scott v Brogan (1937) 157 Or 549, 73 P2d 688.

Lampesis v Comolli (1958) 101 NH 491, 147 A2d 114.

In *Darbrow* v. *McDade* (1958, CA3 Pa), 255 F2d 610, the court overruled the contention that it was reversible error to limit a new trial to the issue of damages, saying:

For particular requisites, tests, and factors.

For review of selected cases individually.

Emerson v Twin State Gas & Electric Co. (1934) 87 NH 108, 174 A 779; Monroe v Sterling (1943) 92 NH 488, 32 A2d 820; Lampesis v Comolli (1958) 101 NH 491, 147 A2d 114.

Bass v Dehner (1937, DC NM) 21 F Supp 567.

United States.—Farrar v Wheeler (1906, CA1 NH) 145 F 482; Darbrow v McDade (1958, CA3 Pa) 255 F2d 610; Tompkins v Pilots Asso. for Bay & River Delaware (1940, DC Pa) 32 F. Supp 439; Yates v Dann (1951, DC Del) 11 FRD 386.

Arizona.—Atchison, T. & S. F. R. Co. v Gutierrez (1926) 30 Ariz 491, 249 P 66; L. C. James Motor Co. v Wetmore (1930) 36 Ariz 382, 286 P 180; Palmer v Kelly (1938) 52 Ariz 98, 79 P2d 344; Kovacovich v Phelps Dodge Corp. (1945) 62 Ariz 193, 156 P2d 240; Hirsh v Manley (1956) 81 Ariz 94, 300 P2d 588.

California.—Leipert v Honold (1952) 39 Cal 2d 462, 247 P2d 324, 29 ALR2d 1185 (declaring that the power of a trial or appellate court to order a new trial on fewer than all the issues "is authorized by statute in this state. (Code Civ Proc §§ 657, 662.)").

Colorado.—Murrow v Whiteley (1952) 125 Colo 392, 244 P2d 657.

Florida.—Florida E. C. R. Co. v. McRoberts (1933) 111 Fla 278, 149 So 631, 94 ALR 376; Brinson v Howard (1954, Fla) 71 So 2d 172.

Idaho.—Mendenhall v MacGregor Triangle Co. (1961, Idaho) 358 P2d 860.

Kansas.—Gill v Smith (1926) 121 Kan 18, 245 P 1041 (applying the provisions of Gen Stat 1949, 60-3004, quoted in Hukle v Kimble (1952) 172 Kan 630, 243 P2d 255; Paul v Western Distributing Co. (1935) 142 Kan 816, 52 P2d 379 (involving the application of Gen Stat 1949, 60-3004, quoted in Hukle v Kimble (1952) 172 Kan 630, 243 P2d 225; Hukle v Kimble (1952) 172 Kan 630, 243 P2d 225.

Kentucky.—Smith v Webber (1955, Ky) 282 SW2d 346; Scuddy Mining Co. v Couch (1956, Ky) 295 SW2d 553; Louisville & N. R. Co. v Mattingly (1958, Ky) 318 SW2d 844; Walling v Flynn (1960, Ky) 332 SW2d 638.

"It is quite true that in McKeon v. Central Stamping Co., 1920, 264 F. 385, this court so held. But our holding in this regard was overruled by the Supreme

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Massachusetts.—Opinion of Justices (1911) 207 Mass 606, 94 NE 846.

Mississippi.—Reynolds v Snowden (1957) 230 Miss 34, 92 So 2d 232.

Missouri.—Kickham v Carter (1960, Md) 335 SW2d 83; Wessels v Smith (1960, Md) 341 SW2d 104; Franklin v Kansas City Public Service Co. (1945) 239 Md App 151, 186 SW2d 546; Zarisky v Kansas City Public Service Co. (1945), 239 Mo App 396, 186 SW2d 854; Ziervogel v Royal Packing Co. (1949, Md App) 225 SW2d 798; May v Hexter (1950, Mo App) 226 SW2d 383; Thompson v St. Louis Public Service Co. (1951, Mo App) 242 SW2d 299; State exrel. Moore v Morant (1954, Mo App) 266 SW2d 723; Moore v St. Louis S. R. Co. (1957, Mo App) 301 SW2d 395 (holding statutes inapplicable under the circumstances involved); Gulley v Spinnichia (1960, Md App) 241 SW2d 301.

New Jersey.—Robinson v Payne (1923) 99 NJL 135, 122 A 882; Juliano v Abeles (1935) 114 NJL 510, 177 A 666; Paolercio v Wright (1949) 2 NJ 412, 67 A2d 168; Rempfer v Deerfield Packing Corp. (1950) 4 NJ 135, 72 A2d 204 (in which the court referred to Rule 3:59-1 as authorizing the limitation); Cannon v Krakowitch (1959) 54 NJ Super 93, 148 A2d 213; Angel v Rand Express Lines, Inc. (1961) 66 NJ Super 77, 168 A2d 423 (in which the court referred to "R. R. 1:5-3(b)" as authorizing the limitation); Walder v Manahan (1941) 21 NJ Misc. 1, 29 A2d 395.

North Carolina.—Alligood v Shelton (1944) 224 NC 754, 32 SE2d 350.

North Dakota.—Deschane v McDonald (1957, ND) 86 NW2d 518.

Pennsylvania.—Durante v Alba (1920) 266 Pa 444, 109 A 796, 9 ALR 485.

Rhode Island.—Clark v New York, N. H. & H. R. Co. (1911) 33 RI 83, 80 A 406, Ann Cas 1913B 356.

Utah.—Wellman v Noble (1961) 12 Utah 2d 350, 366 P2d 701 (under Rule 59(a) of Utah Rules of Civil Procedure).

Court in Gasoline Products Co. v. Champlin Refining Co., 1931, 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188, and the doctrine of that case has been imple-

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Virginia.—Baker v Carrington (1924) 138 Va 22, 120 SE 856; Johnson v Kellam (1934) 162 Va 757, 175 SE 634; Walker v Crosen (1937) 168 Va 410, 191 SE 753; Isenhour v McGranighan (1941) 178 Va 365, 17 SE2d 383; Kavanaugh v Donovan (1947) 186 Va 85, 41 SE2d 489; Certified T. V. & Appliance Co. v Harrington (1959) 201 Va 109, 109 SE2d 126.

Canada.—Bedford v Crapper (1949) Ont Week N 266, (1949) 3 DLR 153 (CA).

In Florida E. C. R. Co. v McRoberts (1933) 111 Fla 278, 149 So 631, 94 ALR 376, the court applied § 4640, CGL § 2921, RGS reading as follows: "Hereafter an appellate court in reversing a judgment of a lower court brought before it for review by writ of error may, by the order of reversal, if the error for which reversal is sought is such as to require a new trial of the action in the court below, direct that a new trial shall be had on all the issues shown by the record or upon a part of such issues only, and when a reversal is had with the direction for a new trial to be had on a part only of the issues, all other issues shall be deemed to be settled conclusively in favor of the defendant in error." The court said: "Under the foregoing statute, the Supreme Court has authority when ordering a new trial to correct an error as to which reversal is sought, to direct that a new trial shall be had on all the issues shown by the record, or upon a part only of such issues, as the right and justice of the case may demand."

In Reynolds v Snowden (1957) 230 Miss 34, 92 So 2d 232, the appellate court, in reversing a judgment in favor of the plaintiff and remanding the case for a new trial on the issue of damages only because of the erroneous admission of evidence as to the extent and nature of the injuries sustained by the plaintiff, referred to "Revised Rules, Supreme Court of Miss. (1953) Rules 12, 13.".

In Durante v Alba (1920) 266 Pa 444, 109 A 796, 9 ALR 485, supra, an action for the destruction of a building, in which it was held on appeal that "the court below was right in entering judgment for plaintiffs, but wrong in the measure of damages adopted by it," the court said: "Happily, under § 1 of the Act of June 16, 1836 (P. L. 785), and § 2 of the Act of May 20, 1891 (P.L. 101), this error can be corrected by so modifying the judgment as to set aside the assessment of damages, and by remitting the record with a procedendo, with leave to produce additional evidence in order that the damages may be properly determined."

mented procedurally by Rule 59(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., and has been followed in this circuit."

In *Smith* v. *Webber* (1955 *Ky*), 282 SW2d 346, the court made the following statement with respect to statutory provisions and rules of court in that jurisdiction:

> "Before the adoption of the Civil Rules of Practice and Procedure, it was the prevailing rule in this jurisdiction that a new trial upon reversal of a judgment was tried de novo with a few exceptions not applicable to personal injury cases and where the classes of damage were easily severable. . . . The appellant submits that CR 59.01 provides for such partial retrial since it declares that,
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> 'A new trial may be granted . . . on all or part of the issues,'
>
> which is different from the provision of Sec. 340 of the Civil Code. This feature of the rule follows corresponding Federal Rule 59, 28 U.S.C.A. . . . It is a matter of discretion whether the court shall direct only a partial retrial. That should be done only when it is clear that no injustice will result from so doing."

In Opinion of Justices (1911), 207 Mass 606, 94 NE. 846, it was stated that it was within the constitutional power of the General Court to provide by law that "if in a civil

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In Kavanaugh v Donovan (1947) 186 Va 85, 41 SE2d 489, the appellate court, in remanding the case for a new trial because of an error in the admission of evidence and the giving of instructions relating to the damages recoverable, limited the new trial to the issue of damages, referring to "Code 1919, § 6365," quoted in Walker v Crosen (1937) 168 Va 410, 191 SE 753.

Waples-Platter Co. v Commercial Standard Ins. Co. (1956) 156 Tex 234, 294 SW2d 375; Iley v Hughes (1958) 158 Tex 362, 311 SW2d 648, 85 ALR2d 1.

Ziervogel v Royal Packing Co. (1949, Mo App) 225 SW2d 798, and Moore v St. Louis S. R. Co. (1957, Mo App) 301 SW2d 395.

case . . . the sole ground for the setting aside of a verdict for the plaintiff is that the verdict is excessive, or inadequate, then a new trial of said case shall be limited to the question of the amount of damages."

Robinson v. *Payne* (1923), 99 NJL 135, 122 A 882, involved the application of provisions reading as follows:

> "In case a new trial is granted it shall only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable. When a new trial is ordered because the damages are excessive or inadequate, and for no other reason, the verdict shall be set aside only in respect of damages, and shall stand good in all other respects." (Rules 72 and 73 of the Practice Act of 1912, subsequently designated as Rules 131 and 132 of the Supreme Court.)

With respect to such provisions, the court said:

> "No doubt these statutory provisions were enacted in this state, and somewhat similar ones in other states, because of the apparent conflict of opinion in this country as to the power of the courts to grant a partial new trial under the common law. . . . In our own state both trial courts and appellate courts have exercised the powers conferred by the rules in question."

In sustaining the quoted provision against objections on constitutional grounds, the court said further:

> "Such a provision is a mere regulation of procedure and does not infringe any constitutional rights."

In *Juliano* v. *Abeles* (1935), 114 NJL 510, 177 A 666, the court, in overruling a motion for the limitation of a new trial to the issue of damages, said with respect to the application of Rules 131 and 132 of the court, quoted in *Robinson* v. *Payne, supra*:

> "As pointed out, the exercise of the power conferred by these rules rests in the sound discretion of the court, and the limitation of a new trial to the

> ascertainment of the quantum of damages will not be ordered unless it clearly appears that the ends of justice will be served thereby. To justify such a limitation, that question must be entirely distinct and separable from the issue of liability; otherwise, such procedure would work a denial of a fundamental right. . . . It must be evident, if that course is to be pursued, that the verdict on the basic issue of liability is not tainted with illegality. The new trial cannot be narrowed to the quantum of damages unless it is plain that the error committed at the trial 'was so limited in character as with justice to both parties to be separable from the other issues determined by the first verdict.' "

Particular requisites, tests, and factors.

The prime requisites for the limitation of a new trial in a tort action to the issue of damages, where such limitation is permissible under the local rules or practice, are (1) that the issue of damages be entirely separate and distinct from the issue of liability, (2) that the liability of the defendant be definitely established, and (3) that such limitation will not operate to the prejudice of the defendant. It has frequently been stated, furthermore, that the power to limit the new trial to the issue of damages must be exercised with caution,[1] and it has been held that any doubt

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[1] *United States.*—Bass v Dehner (1937, DC NM) 21 F Supp 567.

California.—Leipert v. Honold (1952) 39 Cal 2d 462, 247 P2d 324, 29 ALR2d 1185.

Massachusetts.—Simmons v Fish (1912) 210 Mass 563, 97 NE 102, Ann Cas 1912D 588.

New Jersey.—Robinson v Payne (1923) 99 NJL 135, 122 A 882; Phipps v Hulit (1942) 128 NJL 74, 24 A2d 506; Coll v Sherry (1959) 29 NJ 166, 148 A2d 481; Yormack v Farmers' Co-op Asso. (1951) 11 NJ Super 416, 78 A2d 421; Beggs v Pasalano (1951) 14 NJ Super 549, 82 A2d 640; Gilbert v Lahn (1946) 24 NJ Misc 336, 49 A2d 248.

as to the propriety of such limitation must be resolved against it.[2]

Where a new trial is sought by both parties and has been granted on the motion of one as to all issues, a subsequent motion by the other for limitation of such trial to the issue of damages has been held properly refused.[1]

It has been held that a new trial on the issue of damages only cannot be granted in a personal injury action where the jury may mitigate the damages under a comparative negligence law, where there is a substantial disparity between the injuries sustained and the damages awarded, and where the verdict does not indicate whether or not the jury found the plaintiff guilty of contributory negligence and reduced the damages accordingly.[2]

North Carolina.—Jarrett v High Point Trunk & Bag Co. (1907) 144 NC 299, 56 SE 937.

North Dakota.—Deschane v McDonald (1957, ND) 86 NW2d 518.

Pennsylvania.—Mains v Moore (259) 189 Pa Super 430, 150 A2d 549.

Vermont.—Parizo v Wilson (1929) 101 Vt 514, 144 A 856.

In Phipps v Hulit (1942) 128 NJL 74, 24 A2d 506, supra, it was said: "The severance of the question of liability from that of the amount of damages, as is done in the restricting of a new trial to no more than a reassessing of damages, should be exercised with particular care and caution, as this is apt to involve the question of whether the jury, although not satisfied of plaintiff's right to recover, may still, misguidedly and illogically, have brought in a verdict for the plaintiff; and the granting of a new trial, limited to the question of damages only, would leave the plaintiff secure on the finding of liability and give him the opportunity to prove his damages before a jury which would be bound to assume that the finding of liability had been fully deserved."

[2] Leipert v Honold (1952) 39 Cal 2d 462, 247 P2d 324, 29 ALR2d 1185.

1. Myers v Moffet (1958, *Mo*) 312 SW2d 59.

2. Hanisch v Body (1958) 77 *SD* 265, 90 NW2d 924.

The failure of the plaintiff to request the limitation of the new trial to the issue of damages has been assigned as a reason for not ordering such limitation.[3]

Circumstances indicating that an erroneous or improper verdict was motivated or influenced by passion or prejudice have generally been held to preclude limitation of the new trial to the issue of damages,[4] unless it appears that the determination of the issue as to liability was not affected

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3. Cannon v. Krakowitch (1959) 54 *NJ* Super 93, 148 A2d 213.

4. *Arizona.*—Mayo v Ephrom (1958) 84 Ariz 169, 325 P2d 814.

Florida.—Porter v Gordon (1950, Fla) 46 So 2d 19; Florida Power & Light Co. v Watson (1950, Fla) 50 So 2d 543, Seaboard Air Line R. Co. v Ford (1955, Fla) 92 So 2d 160.

Kentucky.—Beasley v Evans' Admrx. (1958, Ky) 311 SW2d 195.

Minnesota.—La Combe v Minneapolis S. R. Co. (1952) 236 Minn 86, 51 NW2d 839; Propper v Chicago, R. I. & P. R. Co. (1952) 237 Minn 386, 54 NW2d 840, 35 ALR2d 459 (recognizing rule).

Missouri.—Taylor v St. Louis Public Service Co. (1957, Mo.) 303 SW2d 608.

New Hampshire.—Smith v Boston & M. R. Co. (1937) 88 NH 436, 191 A 833.

New Jersey.—Klein v Millside Farms, Inc. (1951) 8 NJ 240, 84 A2d 705; Kress v Newark (1952) 8 NJ 562, 86 A2d 185; Yormack v Farmers' Co-op Asso. (1951) 11 NJ Super 416, 78 A2d 421; Wax v Altshuler (1952) 22 NJ Super 229, 91 A2d 768; Rommell v United States Steel Corp. (1961) 66 NJ Super 30, 168 A2d 437; Rafferty v Public Service Intersate Transp. Co. (1934) 13 NJ Misc 80, 177 A 357.

Rhode Island.—Mangigian v Toolin (1950) 77 RI 51, 73 A2d 41.

Wisconsin.—Graff v Hartford Acci & Indem. Co. (1950) 258 Wis 22, 44 NW2d 565.

thereby.[5] It has been held, however, that in such case an appellate court, in remanding the case for a new trial, will not disturb an order of the trial court limiting the retrial to the issue of damages where the defendant does not interpose any objection thereto or does not raise the point in the appellate proceeding.[6]

While the propriety of a separate trial of the issue of damages may be affected, in some degree, by the nature of the tort on which the action is based,[7] no distinction appears to have been made, in the application of the rules and provisions discussed herein, in respect of the nature of the tort generally. It has been expressly held that there is no distinction, in this connection, between an action for a personal injury and other actions.[8]

Separability and independence of issues.

To warrant the limitation of the new trial to the issue of damages, it must appear, in addition to the other requirements,[9] that such issue is entirely separate and distinct from

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5. *Kentucky.*—Louisville & N. R. Co. v Mattingly (1958, Ky) 318 SW2d 844.

Minnesota.—La Combe v Minneapolis S. R. Co. (1952) 236 Minn 86, 51 NW2d 839, infra, § 14; Propper v Chicago, R. I. & P. R. Co. (1952) 237 Minn 386, 54 NW2d 840, 35 ALR2d 459.

New Mexico.—Baros v Kazmierczwk (1961) 68 NM 421, 362 P2d 798.

Rhode Island.—Mangigian v Toolin (1950) 77 RI 51, 73 A2d 41.

Wisconsin.—See Graff v Hartford Acci & Indemn. Co. (1950) 258 Wis 22, 44 NW2d 565.

6. Westover v Chicago, M. S. P. & P. R. Co. (1936) 197 *Minn* 194, 266 NW 741, 267 NW 427.

7. See cases involving particular torts.

8. Tumelty v Peerless Stages (1929) 96 Cal App 530, 274 P 430.

9. For requirements generally.

that of the liability of the defendant.[10] The requisite separateness and independence were held to exist so as to warrant the limitation, under the circumstances involved in the cases cited hereunder; but in other cases a contrary conclusion has been reached.

The Court in the case of *Korbut* v. *Keystone Shipping Co.*, 380 F.2d 352 (1967) in treating with a jury's verdict on the amount of damages stated at page 354:

> "It is equally clear that the District Court substituted its judgment for that of the jury's. That it is a violation of the Seventh Amendment to the Constitution of the United States for a court to so invade the province of a jury is so fundamental that it need not be supported by citation."

In approving the decision of the Trial Court, the Court below has established a principle of law which constitutes a radical departure from uniform and well established law.

The decision by the Court below is in conflict with its own holding in the case of *Caskey* v. *Village of Wayland*, 375 F.2d 1004 (1967), wherein the Court below stated at page 1007:

> ". . . a new trial should not be ordered unless there has been 'an abuse of discretion' and the verdict 'is so high that it would be a denial of justice to permit it to stand.' Dagnello v. Long Is. R.R. Co., supra, 289 F.2d at 806. Accord, Diapulse Corp. of America v. Birtcher Corp., 362 F.2d 736 (2d Cir.) cert. dis-

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10. *United States.*—Norfolk Southern R. Co. v Ferebee (1915) 238 US 269, 59 L ed 1303, 35 S Ct 781; Schuerholz v Roach (1932, CA4 Va) 58 F2d 32, cert den 287 US 623, 77L ed 541, 53 S Ct 78; May Dept. Stores Co. v Bell (1932, CA8 Mo) 61 F2d 830, 32 NCCA 536; Atlantic Coast Line R. Co. v Bennett (1958, CA4 SC) 251 F2d 934; Darbrow v McDade (1958, CA3 Pa) 255 F2d 610; Bass v Dehner (1937, DC NM) 21 F Supp 567; Tompkins v Pilots Asso. for Bay & River Delaware (1940, DC Pa) 32 F Supp 439; Yates v Dann (1951, DC Del) 11 FRD 386.

missed, 385 U.S. 801, 87 S. Ct. 9, 17 L. Ed. 2d 9 (1966); La France v. New York, N.H. & H. R.R. Co., 292 F.2d 649, 650 (2d Cir. 1961) (verdict will not be modified unless 'fantastic'); Wooley v. Great Atl. & Pac. Tea Co., 281 F.2d 78, 80 (3d Cir. 1960) (verdict not to be disturbed unless 'so grossly excessive as to shock the judicial conscience' so that it would be a 'manifest abuse of discretion' not to order a new trial)."

There was no finding by the Trial Court and the record establishes the fact that nothing therein contained justifies a conclusion that the verdict of $25,000 for a man who suffered injury to his knee which required surgical intervention to the extent of fifty odd sutures, resulting in a partial permanent disability of the knee, was so grossly excessive as to shock the judicial conscience or that the verdict was so high that it would be a denial of justice to permit it to stand.

The record will demonstrate that the verdict rather than being high was fair and reasonable and not the result of any undue emotion on the part of the jury.

This is clearly a case wherein the Court below approved the erroneous substitution of the Trial Court's evaluation of the damages for the evaluation placed by the jury.

The verdict in the second trial in the amount of $1,800 constitutes proof that it was a compromise on the issue of negligence which compromise was a foreseeable event, as pointed out in *Caskey* v. *Village of Wayland, supra.*

The question of contributory negligence does not justify nor constitute a basis for retrial of the question of liability. *Cromling* v. *Pittsburgh and Lake Erie R.R. Co.*, 327 F.2d 142 (1963).

The legal support for this position is that all of the authorities are in accord that a Judge may not substitute his judgment for that of a jury. *McAllister* v. *U. S. A.*, 348

U. S. 19, 75 S. Ct. 6. A factual issue, once determined, by a jury as in the instant case may not be ordered relitigated.

The plaintiff has been denied his day in Court on the merits in that a jury verdict at twice the amount of the valuation by the trial judge was held to constitute a capricious and arbitrary verdict but a subsequent verdict in the sum of $1,800 was not. Such a decision establishes that a verdict which happens to be twice that of a court's evaluation is wrong, as a matter of law, but on the contrary a verdict for 1/10th of the Court's evaluation is not, and should be permitted to stand.

Assuming, for the sake of argument, that the Court below was correct in holding that the jury's finding that the appellant was entitled to twice as much as he thought he should receive, justified the Court's setting aside the verdict and ordering a new trial.

The plaintiff was, nevertheless, entitled to a direction of a verdict in his favor on the question of liability alone—which issue had already been decided upon the first trial of this case on the merits in the court below; and/or after the second trial, in the very least, the plaintiff was entitled to an additur—assuming the trial judge's evaluation on the basis of his conditional remittur to have been correct.

It is respectfully submitted that the court below committed reversible error in ordering a new trial of the question of liability, which proved to result in substantial loss to the plaintiff's prejudice.

The Court below in the second trial was in error in refusing appellant's request for a directed verdict on the question of liability in the light of the fact that the question of liability had been determined and constituted *res adjudicata* as to the facts of the case on the merits.

The Court, in the first trial, committed further reversible error in ordering the question of contributory negligence to be re-tried in view of the fact that the record is devoid of a single fact which supported the charge of contributory negligence. The substance of all of the testimony was that the plaintiff, aware of the dangerous condition, exercised the utmost care of which he was capable in going about a slippery and dangerous and encumbered deck and in spite of his care, his foot slipped into an encumberance which tripped him and caused him to fall and suffer the grievous injuries, all of which was proven without any substantial evidence to the contrary.

The opinion by this Honorable Court as it now stands constitutes the establishment of a doctrine that a Judge's evaluation of the damages contrary to the unanimous opinion of twelve jurors constitutes a legal basis for ordering a new trial, not only as to the question of damages but as to the question of liability already unquestionably and properly determined along with the question of contributory negligence, as to which there was no proof in the first trial, and therefore no basis for reopening the door on the subject once having been tried and final judgment having been rendered therein.

Conclusion

Petitioner respectfully submits that the record would justify this Honorable Court in directing the entry of judgment on the verdict of the jury in the first trial as authorized by § 2106 of U.S.C. 28, and as enunciated by this Court in the case of *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S. Ct. 1072 (1967), where the Court stated at page 1076, 1077:

> "Section 2106 of Title 28 provides that,
>
> 'The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may re-

mand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.'

See Bryan v. United States, 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335."

Under all of the circumstances, it is respectfully submitted that the question as to the extent of a jury's province and the limits of the Court's authority on the question of the amount of damages merits consideration, review and reassessment by this honorable Court; otherwise, if the present enunciation by the Court below is permitted to stand, it would constitute a denial to a litigant of a jury trial on the question of damages, for the Court below, in substance, has affirmed the holding by the Trial Court that the mere fact that he differs with the jury is sufficient legal and factual basis for setting aside the entire verdict, including that based on liability, irrespective of the fact that the injuries and permanent disability is so serious as to more than justify the jury's verdict and is not of such an amount as to shock the judicial conscience of the Court.

The holding in the above entitled matter was that, if a jury's verdict is twice that of the Court's evaluation it is a sufficient basis for setting aside the verdict; but, if the verdict amounts to an inconsequential fraction of the Court's evaluation, that then it is perfectly alright for the verdict to stand.

The injustice of this situation is self apparent and needs no argument and affects the rights of every personal injury victim, and the question merits consideration by this Honorable Court.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 268—September Term, 1967.

(Argued January 15, 1968 Decided January 18, 1968.)

Docket No. 31866

FRED COSENTINO,

Plaintiff-Appellant,

against

THE ROYAL NETHERLANDS STEAMSHIP COMPANY,

Defendant-Appellee.

Before:

LUMBARD, Chief Judge,
WATERMAN and FEINBERG, Circuit Judges.

Appeal by plaintiff from a judgment of the United States District Court for the Eastern District of New York, John R. Bartels, *J.*, entered February 17, 1967, on a jury verdict of $1800 in favor of plaintiff in personal injury action.

Affirmed.

JACOB RASSNER, New York, N. Y., for plaintiff-appellant.

WILLIAM F. MCNULTY, New York, N. Y. (Daniel J. Coughlin, New York, N. Y., on the brief), for defendant-appellee.

PER CURIAM:

This appeal by plaintiff from a judgment entered on a jury verdict of $1800 in his favor following the second trial of his action in the Eastern District presents the question whether Judge Dooling, who presided at the first trial, abused his discretion in ordering that the entire action be retired unless the plaintiff agreed to remit a portion of the $25,000 jury verdict awarded to plaintiff in that first trial. We hold that there was no abuse of discretion and affirm the judgment.

Plaintiff brought suit for personal injuries suffered while employed as a longshoreman aboard defendant's ship. The original trial before Judge Dooling and a jury in the District Court for the Eastern District of New York resulted in a jury verdict of $25,000 for the plaintiff. Defendant moved for a new trial, and Judge Dooling ordered that the verdict be set aside and a new trial granted unless plaintiff would remit $12,000 of the $25,000 verdict. Plaintiff declined to remit the $12,000, and the case was then retried before Judge Bartels and a jury, resulting in a jury verdict of $1800 for the plaintiff. From the judgment entered on this verdict, the plaintiff appeals, claiming that there was no basis for Judge Dooling to impose the remittitur after the first trial and that Judge Dooling erred in ordering a new trial of the entire action rather than only on the issue of damages.

Whether a verdict is excessive and whether a new trial should be granted pursuant to a motion under Rule 59 of the Federal Rules of Civil Procedure are questions addressed to the discretion of the trial judge. Considering the evidence on the issue of damages, we find no abuse of discretion by Judge Dooling in ordering that the action be retried unless the plaintiff agreed to remit $12,000 of the jury's verdict.

Where the district court has determined that the verdict is so excessive as to require a new trial, the question whether the retrial should relate to the issue of liability as well as to the issue of damages is likewise addressed to the discretion of the trial judge. In the present case, where the doctrine of comparative negligence is involved and the amount of plaintiff's damages is related to the issue of plaintiff's contributory negligence, it seems entirely proper to retry the entire action and not to limit the issue on retrial to the amount of plaintiff's damages. The appellant has cited no precedent to the contrary. Again, we find that there was no abuse of discretion by Judge Dooling.

The judgment is affirmed.

Judgment of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of January one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
" STERRY R. WATERMAN,
" WILFRED FEINBERG,
Circuit Judges.

FRED COSENTINO,
Plaintiff-Appellant,

v.

THE ROYAL NETHERLANDS STEAMSHIP COMPANY (KONINKLIJKE NEDERLANSCHE STOOMBOOTS MAATSCHAPPIJ N. V.), THE HAGUE, HOLLAND,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

Order Denying Petition for Hearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 31866

FRED COSENTINO,

Plaintiff-Appellant,

v.

THE ROYAL NETHERLANDS STEAMSHIP COMPANY (KONINKLIJKE NEDERLANSCHE STOOMBOOTS MAATSCHAPPIJ N. V.), THE HAGUE, HOLLAND,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant Fred Cosentino,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
STERRY R. WATERMAN,
WILFRED FEINBERG,
Circuit Judges.

12 March 1968

Order, En Banc, Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 31866

FRED COSENTINO,

Plaintiff-Appellant,

v.

THE ROYAL NETHERLANDS STEAMSHIP COMPANY (KONINKLIJKE NEDERLANSCHE STOOMBOOTS MAATSCHAPPIJ N. V.), THE HAGUE, HOLLAND,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant Fred Cosentino and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

March 12, 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 180

FRED COSENTINO,

Petitioner,

against

THE ROYAL NETHERLANDS STEAMSHIP COMPANY,

Respondent.

BRIEF OF RESPONDENT, THE ROYAL NETHERLANDS STEAMSHIP COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DANIEL J. COUGHLIN,
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30 East 42nd Street,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1518

FRED COSENTINO,

Petitioner,

against

THE ROYAL NETHERLANDS STEAMSHIP COMPANY,

Respondent.

BRIEF OF RESPONDENT, THE ROYAL NETHERLANDS STEAMSHIP COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

This brief is being submitted by Royal Netherlands Steamship Company, the respondent above named, in opposition to the petition of petitioner, Fred Cosentino, for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner, a longshoreman employed by an independent stevedoring contractor, sprained his knee, when he slipped and fell on an allegedly slippery deck, while he was working aboard the SS ARTEMIS, a vessel operated by respondent, Royal Netherlands Steamship Company.

The above-entitled action to recover damages for his injury was tried twice in the United States District Court, Eastern District of New York. The first trial was before Hon. John F. Dooling, Jr., and a jury and resulted in a verdict in the sum of $25,000.00 in favor of petitioner. By an order made and entered on February 8, 1966, however, the Court set aside said verdict on the ground of excessiveness and ordered a new trial of the action unless petitioner agreed, within ten days, to remit $12,000.00 of the amount of the verdict (83a), which he declined to do. In setting aside the exorbitant verdict in the sum of $25,000.00 for a knee sprain the District Judge observed that the testimony of Dr. Tagliagambe, the physician who treated petitioner, in which he attempted to connect petitioner's knee condition with the accident herein, "shocked me" because he had in his possession "a pathological report from its own laboratory showing it was chronic" (76a).

The action was retried before Hon. John R. Bartels and a jury and resulted in a verdict in the sum of $1,800.00 in favor of petitioner.

Petitioner thereafter appealed to the United States Court of Appeals, for the Second Circuit, from the final judgment in the sum of $1,800.00 entered in his favor in the office of the Clerk of the United States District Court for the Eastern District of New York on February 17, 1967, and, as an incident to said appeal, brought up for review the non-final order of Judge Dooling setting aside the $25,000.00 verdict of the jury at the first trial and ordering a retrial of the action.

The judgment and order below were unanimously affirmed by the Court of Appeals, with an opinion which will be found at pages 32-34 of petitioner's moving papers herein.

A subsequent petition for a rehearing of the appeal *En Banc* was denied by the Court.

Decision Below

In affirming the judgment and order appealed from the Court of Appeals, in a *Per Curiam* opinion, held:

> "Whether a verdict is excessive and whether a new trial should be granted pursuant to a motion under Rule 59 of the Federal Rules of Civil Procedure are questions addressed to the discretion of the trial judge. Considering the evidence on the issue of damages, we find no abuse of discretion by Judge Dooling in ordering that the action be retried unless the plaintiff agreed to remit $12,000 of the jury's verdict."

The Court further held:

> "Where the district court has determined that the verdict is so excessive as to require a new trial, the question whether the retrial should relate to the issue of liability as well as to the issue of damages is likewise addressed to the discretion of the trial judge. In the present case, where the doctrine of comparative negligence is involved and the amount of plaintiff's damages is related to the issue of plaintiff's contributory negligence, it seems entirely proper to retry the entire action and not limit the issue on retrial to the amount of plaintiff's damages. The appellant has cited no precedent to the contrary. Again, we find that there was no abuse of discretion by Judge Dooling."

FIRST POINT

The ruling of the District Court setting aside the exorbitant verdict of $25,000.00 in favor of petitioner at the first trial, unless petitioner agreed to remit $12,000.00 of the amount thereof, constituted an eminently proper exercise of the judicial discretion reposed in the Court under Rule 59 of the Federal Rules of Civil Procedure.

Petitioner's injury was a very minor one, which, although it is claimed that it left some slight limitation of motion in his right knee, did not incapacitate him to any appreciable extent. By any fair standard, the $25,000.00 recovery allowed him by the jury at the first trial was not only excessive but so grossly excessive that no Trial Judge could possibly have permitted the same to stand. On the basis of the damage proof in this case, it can even be argued that the $13,000.00 recovery, which the order of Judge Dooling allowed petitioner to retain, was excessive.

If there is any principle of Federal practice that is now too firmly established to admit of doubt, it is that a motion to set aside a jury verdict on the ground of excessiveness, under Rule 59 of the Rules of Civil Procedure, is addressed to the sound judicial discretion of the Trial Judge and that his exercise of this judicial discretion will not be disturbed on appeal except for a manifest abuse thereof—which, as already noted, the Court of Appeals specifically found did not occur in the case at bar.

Neese v. *Southern Ry. Co.*, 350 U. S. 77, 76 S. Ct. 131, 100 L. Ed. 60 (1955);

Fairmount Glass Works v. *Cub Fork Coal Co.*, 287 U. S. 474, 481, 53 S. Ct. 252, 77 L. Ed. 439 (1932) and cases cited in Footnote 4, page 481;

Dagnello v. *Long Island R. R. Co.*, 289 F. 2d 797, 806 (2 Cir., 1961);

Commercial Union Ins. Co. v. *Rivera*, 358 F. 2d 480, 484 (1 Cir., 1966);
Rachesky v. *Finklea*, 329 F. 2d 606, 610 (4 Cir., 1964);
City of Richmond v. *Atlantic Co.*, 273 F. 2d 902, 916-917 (4 Cir., 1960);
Hardware Mutual Ins. Co. v. *Chapman*, 272 F. 2d 614, 617 (7 Cir., 1960);
Campbell v. *Clark*, 271 F. 2d 578, 579 (10 Cir., 1959);
Virginian Ry. v. *Armentrout*, 166 F. 2d 400, 407 (4 Cir., 1948).

The jurisdiction of the Court of Appeals to review an order of the District Court, granting or denying a motion to set aside a jury verdict on the ground of excessiveness, was well defined in *Dagnello* v. *Long Island R.R. Co.*, *supra*. In declining to disturb an order of the District Court denying a motion by the defendant to set aside the verdict of the jury in that case on the ground of excessiveness, the Court of Appeals in the Second District, writing through Circuit Judge Medina, stated (p. 806):

> "If we reverse, it must be because of an abuse of discretion. If the question of excessiveness is close or in balance, we must affirm. The very nature of the problem counsels restraint. Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded, so are we appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ,

but a question of law, *Virginian Ry.* v. *Armentrout, supra.* This betokens no lack of confidence in the jury system or in trial judges."

In *Dellaripa* v. *New York, New Haven & Hartford R.R. Co.*, 257 F. 2d 733, 735 (2 Cir., 1958), the same Court stated:

> "Surely the Trial Court has the power to set aside the jury's verdict if he believes that it is excessive, but obviously that power must be exercised with due regard for the jury's primary responsibility to fix the amount of the damages. However, the responsibility for the amount of the damages awarded does not lie exclusively with the jury—its responsibility is primary, but not final. The ultimate responsibility rests with the Trial Judge who may set the verdict aside. His power to set aside a verdict as excessive implies that he has a duty to do so when he conscientiously believes that the jury has exceeded the bounds of propriety. This duty should not be avoided by hiding behind the jury's verdict. * * *"

As any lawyer who practices in any of the Federal District Courts knows, the Judges in said Courts are extremely loath to disturb jury verdicts, even though they may be high, unless they honestly believe that they are so grossly excessive as to be unconscionable—which is clearly true of the $25,000.00 verdict rendered by the jury at the first trial of this action.

Where a jury verdict is so excessive as to shock the conscience of the Court, the Trial Judge not only has the legal right but he is under a duty to set it aside.

> *Linn* v. *United Plant Guard Workers of America*, 383 U. S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966).

SECOND POINT

The District Court also properly exercised the judicial discretion reposed in it under Rule 59 of the Federal Rules of Civil Procedure in ordering a new trial of the entire action upon petitioner's refusal to remit $12,000.00 of the amount of the shockingly high verdict rendered by the jury at the first trial.

Rule 59 of the Federal Rules of Civil Procedure specifically authorizes the Trial Judge to set aside a jury verdict and to grant a new trial "on all or part of the issues, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; * * *"

Research has failed to disclose a single Federal case—nor does petitioner cite any in his brief—which holds that, in setting a jury verdict aside on the ground of excessiveness, the District Court must in every case limit the retrial to the damage issue only, as now claimed by petitioner (Pet's Br., Pts. II and III, pp. 9-30). It is submitted that in the case at bar the Court of Appeals properly held that, under Rule 59 of the Federal Rules of Civil Procedure, the question of whether the entire action or the damage issue herein only should have been retried likewise was one that was addressed to the sound judicial discretion of the Trial Judge.

In a case like the case at bar, where the comparative negligence doctrine is applicable and the issue of the contributory negligence of the plaintiff himself is so inextricably interwoven with the amount recoverable by the plaintiff that it is impossible to separate one from the other, it is difficult to understand how the Court can possibly direct a new trial of the damage issue only, without depriving the defendant of his legal right to have the recovery allowed the plaintiff reduced by an amount proportionate

to the plaintiff's own contributory negligence, which in turn is an issue that is so interrelated with the negligence of the defendant that the two issues are inseparable. Although District Judge Dooling observed that the jury's finding at the first trial that the defendant was negligent "seems to be beyond challenge" (83a), he did not suggest that the plaintiff himself was free from any contributory negligence. Furthermore, there is no way of telling from the record to just what extent, if any, the jury found that the plaintiff's own negligence contributed to the accident resulting in his injury. The District Court obviously had no more right to speculate with respect to this matter than it had to speculate with respect to anything else that may have occurred during the course of the jury's deliberations.

Although the decisions in the Federal Courts uniformly hold that, where a jury verdict has been set aside on the ground of excessiveness, the question of whether the entire action or the damage issue only should be retried is one that is addressed to the sound judicial discretion of the Trial Judge, they also seem to uniformly hold that a partial retrial of the action should never be ordered unless the issue being retried is so distinct and separate from the other issues in the case that a retrial of such issue only can be had without prejudice to rights of either party.

Gasoline Products Co. v. *Champlain Refining Co.*, 283 U. S. 494, 500, 51 S. Ct. 573, 75 L. Ed. 1188 (1931);

Roma v. *Baldwin*, 317 F. 2d 919, 922 (3 Cir., 1963);

Mason v. *Mathiasen Tanker Industries, Inc.*, 298 F. 2d 28, 33 (4 Cir.,);

Barbrow v. *McDade*, 255 F. 2d 610, 611 (3 Cir., 1958);

Atlantic Coast Line R.R. Co. v. *Bennett*, 251 F. 934, 938 (4 Cir., 1958);

Atkinson v. *Dixie Greyhound Lines*, 143 F. 2d 477, 479 (5 Cir., 1944), cert. denied 323 U. S. 758, 65 S. Ct. 92, 89 L. Ed. 607.

As heretofore noted, in the case at bar the damage issue is so inextricably interwoven with the issue of petitioner's own contributory negligence, which, in turn, can be determined only in the light of the alleged negligence of respondent, that it is impossible to divorce one of these issues from the other without depriving respondent of the benefit of the comparative negligence doctrine.

There is no conflict between the cases hereinabove cited and the holding of the Court of Appeals in the Second Circuit in *Berner* v. *British Commonwealth Airlines, Ltd.*, 346 F. 2d 532 (2 Cir., 1965), on which petitioner now relies heavily to support his claim that only the damage issue herein should have been retried (Pet's Br., Pt. 11, p. 9).

In the *Berner* case the situation before the Court was radically different from the one before the Court in the case at bar. In that case, which did not involve the doctrine of comparative negligence, the District Court not only set aside the jury's verdict in favor of the defendant on the issue of liability but then usurped the function of the jury by directing a contrary verdict in favor of the plaintiff on said issue, or, in the alternative, ordered a new trial on all of the issues in the case in the event that on appeal the Court set aside the judgment entered in favor of the plaintiff notwithstanding the verdict of the jury.

As the Court of Appeals, writing through Circuit Judge Moore, stated at pages 535-536 of its opinion of reversal in the *Berner* case, "The primary issue to be resolved upon this appeal is whether the trial court was justified in setting aside the jury's verdict in favor of the defendant and, assuming the jury's role as fact finder, granting judgment to plaintiff", which, under the facts of that case, clearly violated the defendant's constitutional right to a jury trial.

No such issue is presented in the case at bar, where the same Court of Appeals held that the Trial Judge properly exercised the judicial discretion reposed in him under Rule

59 of the Federal Rules of Civil Procedure not only in setting aside the exorbitant verdict of the jury in the sum of $25,000.00 in favor of petitioner at the first trial of this action but in thereafter ordering a retrial of the entire action in the event that petitioner declined to remit $12,000.00 of the amount of said verdict. Because the question before it in the *Berner* case was strictly one of law as to whether or not there was an issue of fact as to liability to go to the jury and whether or not the remarks of the defendant's counsel complained of by the plaintiff were prejudicial, the Court of Appeals, upon resolving these issues of law in favor of the defendant, reversed the judgment of the District Court and ordered that judgment be entered upon the jury's verdict in favor of the defendant. Although the Court also reversed the conditional grant of a new trial in the event that the judgment n.o.v. were reversed, it is clear from its opinion that, under the facts of that case, a new trial of the entire case was wholly unnecessary. It is submitted that there is nothing in this portion of the Court's opinion (pp. 541-542) to suggest that in every case where the District Court sets aside a jury verdict on the ground of excessiveness, it *must* direct a retrial of the damage issue only.

The other Federal cases cited under Points II and III of petitioner's brief likewise have no bearing whatever on the issue presently before this Court. As the Court will see when it reads the same, most of these cases deal either with the doctrine of estoppel by judgment or the doctrine of collateral estoppel, which is based upon an entirely different premise than a motion to set aside a jury verdict on the grounds covered by Rule 59 of the Federal Rules of Civil Procedure.

In *Silverii* v. *Kramer*, 314 F. 2d 407, 410 (3 Cir., 1963), from which petitioner quotes at the top of page 12 of his brief, the District Court, like the District Court in the *Berner* case, not only set aside the verdict of the jury but, in addition thereto, usurped the function of the jury by

then directing a contrary verdict. In the case at bar there is no claim that Judge Dooling usurped the function of the jury by directing a verdict in favor of either party.

There is likewise nothing in the opinion of the Court of Appeals in the Second Circuit in *Dagnello* v. *Long Island R.R. Co., supra,* from which petitioner quotes at pages 12-13 of his brief, to suggest that there was any impropriety whatever in the action of Judge Dooling in the case at bar in ordering a retrial of the entire action instead of limiting the retrial to the damage issue only, which, for the reason hereinabove set forth, cannot be divorced from the issue of petitioner's own contributory negligence, which, in turn, was dependent upon the negligence of respondent.

No useful purpose is to be served by discussing the plethora of State court decisions cited by petitioner throughout his brief, which are based entirely on State practice procedure and therefore have no bearing on the issue presently before this Court, where we are concerned only with the jurisdiction of the United States District Court under Rule 59 of the Federal Rules of Civil Procedure.

CONCLUSION

The petition for a writ of certiorari herein should be denied.

Dated: New York, New York, June 24, 1968.

Respectfully submitted,

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